

STATE OF ILLINOIS
BEFORE THE ILLINOIS COMMERCE COMMISSION

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In the Matter of Level 3 Communications,)	
LLC's Petition for Arbitration Pursuant to)	
Section 252(b) of the Communications Act of)	Case No. 04-0428
1934, as amended by the Telecommunications)	
Act of 1996, and the Applicable State Laws for)	
Rates, Terms, and Conditions of)	
Interconnection with Illinois Bell Telephone)	
<u>Company d/b/a SBC Illinois</u>)	

**LEVEL 3 COMMUNICATIONS, LLC’S REPLY IN SUPPORT
OF ITS MOTION TO COMPEL SBC ILLINOIS
TO PROVIDE FULL DISCOVERY RESPONSES**

COMES NOW Level 3 Communications, LLC (“Level 3”), by its attorneys, pursuant to Part 200.370 of the Commission’s Rules of Practice, 83 Ill. Admin. Code § 200.370, and hereby files this Reply in Support of its Motion to Compel Illinois Bell Telephone Company d/b/a SBC Illinois (“SBC”) to Provide full responses to outstanding discovery requests. In Reply to SBC’s Response pleading, Level 3 states as follows:¹

The Parties have reached agreement on a number of the initial discovery disputes raised in the meet and confer call. Level 3 continues to believe that for certain of its remaining discovery requests, SBC is obligated to provide substantive responses, which SBC refuses to do. As such, Level 3 will continue to proceed with its Motion to Compel in the belief that the Commission must order SBC to fully respond to the requests. Level 3 has determined that it will withdraw its Motion to Compel for the following requests only at this time: DRs 6, 18, 26 and

¹ Due to the truncated scheduling for filing Replies, Level 3 reserves the right to raise additional positions in the event of oral arguments on the Motion.

30. Level 3 will continue to try and work with SBC to obtain satisfactory responses, as detailed below.

I. THE ICC RULES OF PRACTICE REQUIRE FULL AND COMPLETE DISCLOSURE OF RELEVANT AND MATERIAL FACTS

First and foremost, the ALJ is provided guidance on the Motion by the Commission's Rules of Practice and Procedure. In those regulations, it is the stated goal of the Commission to encourage full and total disclosure of discovery issues. Part 200.340 reads as follows:

It is the policy of the Commission to *obtain full disclosure of all relevant and material facts to a proceeding*. Further, it is the policy of the Commission to encourage voluntary exchange by the parties and staff witnesses of all relevant and material facts to a proceeding through the use of requests for documents and information. Formal discovery by means such as depositions and subpoenas is discouraged unless less formal procedures have proved to be unsuccessful. It is the policy of the Commission not to permit requests for information, depositions, or other discovery whose primary effect is harassment or which will delay the proceeding in a manner which prejudices any party or the Commission, or which will disrupt the proceeding.

83 Ill. Admin. Code § 200.340. A party may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the proceeding. Ill. S. Ct. R. 201(b)(1), 83 Ill. Adm. Code § 200.340.

Based upon these foundations, the ALJ must review the Motion to Compel and determine whether the requested material is relevant to the issues raised in the Petition for Arbitration and, if so, must compel SBC to provide substantive and complete responses. Any interrogatories or requests for documents related to the issues raised in the Petition are relevant to this proceeding, and discovery related thereto is appropriate.

II. SBC MUST BE COMPELLED TO PROVIDE FULL RESPONSES TO THE DISPUTED DISCOVERY REQUESTS.

In its response, SBC repeatedly claims that the requested discovery is not relevant to the issues raised in the proceeding. With all due respect, each and every one of the disputed requests

are relevant to the issues raised in Level 3's Petition. Rather than respond to the questions Level 3 raises in its requests, SBC would rather respond to the questions it wanted Level 3 to ask. Such is not the case, however, and SBC should be compelled to respond to Level 3's requests.

DRs 4 and 5-

Level 3 sought SBC to list all hazardous substances that are present at the SBC facilities into which Level 3 will likely collocate, and all documents related to those materials. In its response, SBC explains that SBC has accepted Level 3's proposed language with respect to General Terms and Conditions, Section 32, and that no further disputes exist with respect to Hazardous Materials. Due to the truncated Reply schedule, Level 3 is still reviewing this position and will inform the ALJ if SBC's response is satisfactory, while reserving its rights to proceed with the Motion to Compel if unsatisfied.

DR 7 -

Level 3 sought SBC to identify and provide copies of all contracts, agreements, etc. reflecting the circumstances under which SBC has secured a deposit or other assurances of payment from CLECs after January 2001. SBC's response consists merely of an email containing an electronic link to the ICC's web page that purportedly provides an electronic copy of all responsive contracts, after "a little bit of searching".

In its Response, SBC claims that the request is not relevant to any disputed issues in the Petition. The issue of the appropriate deposit or other assurance of payment is clearly an issue raised in this arbitration. While the Motion contains a scrivener's error and makes reference to Issue 11 in the Petition, Level 3 intended that the Motion refer to Issue 12, labeled as "Deposits" in the Petition, and further refined in the Level 3 Supplemental Statement of Issues to state "Under what circumstances should a deposit be required and, if required, can Level 3 dispute

SBC's demand for a deposit?" As explained in the Motion to Compel, SBC's supplemental response fails to provide any actual substantive response at all. Rather than providing a copy of the actual terms and agreements as requested, SBC merely points to an online searching mechanism, while failing to provide Level 3 with any search guidelines at all – i.e., no party names, no docket numbers, etc. SBC's response seems to be "Your answer is out in the universe somewhere, and we will not narrow down your search in any reasonable manner." SBC should be required to provide electronic or paper copies of responsive documents.²

DR 8 -

One of the issues before the Commission in this arbitration is the ability of SBC to impose threat of disconnect for failure to pay alleged amounts due. Under SBC's proposed language in the negotiations, SBC could disconnect Level 3's Illinois customers for amounts allegedly unpaid for services performed in the other SBC states, irrespective of whether Level 3 has disputed the SBC bill in that other state. As such, Level 3 should have the ability to discover SBC's history related to the issue of threatened disconnections, raised in the Petition as Issue 11. This request is drafted towards discovering whether SBC has ever been accused of or investigated for improperly threatening to disconnect services for allegedly not paying for services. As such, it is relevant and likely to lead to discovery of admissible evidence.

In its response, SBC merely asserts that the request is not relevant to any issues raised in the Petition. SBC Response, p. 4. SBC continues to explain that its view of the Commission's role is to determine whether it is reasonable for SBC to request assurance of payments when it becomes aware that a CLEC is unable to meet its obligations in other states. *Id.*, p. 5. Level 3 may or may not agree with SBC's assertion. Notwithstanding, in order for the Commission to

² Counsel for Level 3 and SBC are attempting to reach a common ground on this request. Due to the truncated Reply schedule, Level 3 is still reviewing this position and will inform the ALJ if SBC's proposed revised response is satisfactory, while reserving its rights to proceed with the Motion to Compel if unsatisfied..

make an educated decision on the issue both parties agree is raised in the Petition (i.e., the disconnection terms), the Commission will receive substantial benefit from getting an understanding of the impact of the language that SBC is promoting in this arbitration. There is an obvious nexus between the request and the issues raised in the Petition that SBC fails to address or even acknowledge. The request is relevant, is likely to lead to the discovery of admissible evidence, and SBC should be compelled to provide a thorough response.

In its revised response to DR 8, SBC states that it is not aware of any such proceeding before the Illinois Commerce Commission. Left unsaid in SBC's response is whether such investigations or complaints have ever been raised in any of the other 12 states in which SBC operates as an ILEC. The request certainly seeks such information, and SBC has failed to address the request.

DR 9 -

At present, Level 3 has seen none of the Confidential Files referred to in the SBC response. Upon execution of a Protective Order, SBC should provide the responsive documents, and Level 3 will review for satisfaction. Until Level 3 has had the opportunity to review the confidential material, it is not in a position to know whether the response is adequate.

DR 11 -

Level 3 sought a list of "those SBC end offices in the state in which the SBC affiliate ISP has *collocated equipment* ..." SBC's revised response asserts that "the SBC ISP affiliates in Illinois have no *collocation space* in the SBC Illinois' central offices." According to SBC, the fact that its ISP affiliates have no collocation space in Illinois central offices, by definition, means that SBC's ISP affiliates have no telecommunications equipment in SBC's central offices. SBC Response, pp. 5-6.

As explained in the Motion, this is an unresponsive answer to the request. Level 3 did not seek whether SBC's ISP affiliate had "collocation space" in Illinois as that term is defined in the Federal Act. Rather, the request seeks a list of those end offices in which SBC's ISP affiliates' keep equipment, irrespective of whether such equipment is collocated or not. In similar arbitrations in other ILEC territories, Level 3 asked similar data requests and learned that other ILECs allow their ISP and VoIP affiliates to maintain equipment in the ILEC central office outside of a "collocation space". Through Level 3's experience, it is not "by definition" that the lack of collocation space means no equipment. The request is relevant, is likely to lead to the discovery of admissible evidence and SBC should be compelled to provide a full response to the question Level 3 asked, not the question SBC wants to answer.

DR 12 -

In language SBC proposed during the course of negotiations (and language Level 3 expects SBC to propose in its upcoming Response to the Petition), SBC attempts to impose a requirement that Level 3's customers be physically present in the local calling area for a call to be deemed local in nature. For instance, SBC is attempting to promote language in its version of the Interconnection Agreement that would prohibit Level 3 from deeming as a local call those calls terminating at an ISP via FX or FX-like services.

SBC refuses to provide a response to DR 12 based on its misguided belief that the information requested is not relevant to the issues raised in the Petition. SBC Response, p. 6. According to SBC, the issue has been extensively litigated at the Commission, and is now a legal issue, not a factual issue. *Id.* First, Level 3 does not agree that the Commission has reaffirmed SBC's position, as SBC claims. Second, Level 3 does not believe that a party can be permitted to fail to respond to a valid discovery request just because that party thinks the underlying issue

is not factual in nature. SBC is obligated to fully respond to all relevant requests per the Commission's Rules of Practice, not to some alternative standard that SBC deems appropriate.

Further, SBC's argument is without foundation. The facts that are required for an adequate review of the Parties' positions are whether SBC's ISP affiliate has a physical presence in every local calling area, as SBC is attempting to force Level 3 to do with its proposed language. Simply put, this information is relevant to the issues raised in the Petition, and the fact that SBC is attempting to withhold providing the response makes Level 3 think that the answer may not be favorable to SBC.

In either event, the information sought is relevant, likely to lead to admissible evidence, and SBC should be compelled to provide a full response.

DRs 16 and 17 -

As noted above, Level 3 has determined that it will not pursue its Motion to Compel with respect to DR 18. In the remaining requests, each request included information related to SBC's plans for providing Internet Enabled services, including VoIP, to its customers either through itself, its own IP affiliate or through a third party. It is clear that the Internet enabled traffic, including VoIP, is a Tier I issue in the arbitration (see, Issue 6), so any claim of relevancy is without merit.

With respect to the objection over providing information from its affiliate, that, too is without merit. Level 3, like SBC's VoIP affiliate, provides interconnection services for enhanced service provider's ("ESPs") applications such as Voice embedded IP services. SBC has generally taken the position throughout negotiations that regardless of whether Internet-enabled traffic that terminates to an Enhanced Service Provider is an information or telecommunications service, if it originates in one LATA and terminates in another, it is subject

to access charges. Obviously, Level 3 intends to follow FCC regulations and orders that treat ESP's as end-users, not as carriers. Thus, for purposes of intercarrier compensation, Level 3's ESP customers must be treated like any other business customer of local services and the carriers exchange reciprocal compensation for that traffic.

The requests at issue are designed to obtain discovery on the manner in which SBC treats either itself or its VoIP affiliate, and whether that treatment will vary from the manner in which SBC seeks to treat Level 3. Whether the language proposed by SBC will allow SBC to treat its own or its VoIP affiliates different than the manner in which SBC will treat Level 3 is surely an issue the Commission must evaluate when determining the appropriateness of SBC's language. These requests are designed to provide just that sort of factual analysis. As such, the requests are relevant, likely to lead to admissible evidence, and SBC should be compelled to provide full responses to the requests.

DRs 20 -

To the extent that SBC is relying on its revised response to DR 22 in order to respond to DR 20, then SBC should revise its response to clearly and articulately so state. Due to the truncated Reply schedule, Level 3 is still reviewing this position and will inform the ALJ if SBC's response is satisfactory, while reserving its rights to proceed with the Motion to Compel if unsatisfied.

DR 23 -

SBC's response to DR 23 is an excellent example of SBC's seemingly responsive answer, but in actuality SBC has not provided a single ounce of responsive material. SBC seeks to require Level 3 to establish separate trunk groups, one for local and IntraLATA traffic and a second for InterLATA traffic for the interconnection of traffic. SBC accomplishes this by

refusing to allow multiple traffic types to flow across its interconnection trunks (i.e., forcing Level 3 to build out two parallel trunk networks). The sole rationale provided Level 3 through the course of negotiations for this SBC position is that SBC wants to ensure its access revenues on interLATA traffic.

Level 3 has requested both an identification and an explanation of any system SBC has that is able to track CLEC local versus non-local traffic. This is obviously important, as SBC claims that Level 3 must incur the costs associated with developing two different trunk networks in order to ensure SBC's access revenues. If there are systems already in place that allow for tracking local calls, then such a duplicative trunk network is not needed. In its response SBC does not pursue any relevancy or burden objections. Rather, SBC merely states that its revised response is adequate. Such is not the case, as the revised response fails to provide even the name of these mystery "proprietary message processing systems" to which it refers, much less an explanation of how these systems work, where they are located, etc. Level 3 and this Commission can only suppose that the unknown systems are not functional in the manner SBC claims, until such time as SBC provides data otherwise. They have not done so as yet.

SBC's response provides no information or documents that detail the message processing systems, as Level 3 requested. The Commission must compel SBC to provide the Commission and Level 3 with a detailed explanation of the "message processing systems" it mentions in its revised response (as well as any other such systems, if they exist), and provide any related documentation describing the systems.

DR 28 -

Level 3 seeks information related to SBC's provisioning of FX services in Illinois. It is without a doubt that the issue of the appropriate manner in which to treat FX traffic is within the

scope of this arbitration (e.g., see Issues 4 and 7). SBC has taken the position that the definition of local call for purposes of Inter-carrier Compensation is based on the physical location of the calling parties, and that access charges may be imposed for these types of FX calls.

However, Level 3 would note that *SBC's own tariffs treat FX calls as local* in nature, even though the terminating customer is not in the same local calling area as the originating customer. In contrast, SBC seeks to force Level 3 to treat FX calls as non-local for purposes of inter-carrier compensation, thus forcing Level 3 to pay access charges.

In its response, SBC claims that this issue has been thoroughly examined by the Commission in prior arbitrations, and that the issue is not one of legal arguments, not factual issues. Level 3 disagrees. First, a party to a proceeding should never be precluded from responding to discovery just because that party believes the underlying issue to be legal, not factual. Such a position is directly counter to the Commission's Rules of Practice, which require parties to respond to all relevant discovery requests. 83 Ill. Admin. Code § 200.340. SBC's Response seeks to impose a far different standard than that adopted in the Commission's Rules.

Further, SBC again glosses over the facts in order to get out of providing a substantive response to discovery. Level 3 seeks data related to SBC's provisioning of FX services in Illinois. As is apparent from the Petition, the Parties are at extreme odds on the appropriate manner in which to treat FX traffic (i.e., is it local or not?). SBC has proposed in the course of negotiations certain language that would treat this traffic as non-local for purposes of Inter-carrier compensation, forcing Level 3 to pay SBC access charges for this local traffic. This request is designed to elicit facts upon which the Commission can ascertain whether SBC's proposed language is consistent with the manner in which SBC treats its own FX traffic. The request is

relevant and likely to lead to the discovery of admissible evidence. As such, SBC should be compelled to provide a full response to the request.

WHEREFORE, for the above stated reasons, Level 3 Communications, LLC respectfully requests this Commission to enter an order compelling SBC to provide full and comprehensive responses to the above disputed requests as soon as practicable, but in no even more than two (2) days.

Respectfully submitted,

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